LIM CHOOI CHUAN & ORS. v. LIM CHEW CHEE.

[O. C. J. (Bostock Hill J.) October 15, 1948]

[Penang — Originating Summons No. 66 of 1948]

Will and Trust — Trust to found a temple for members of a Chinese "Seh" — Charitable Trust — Cy-pres doctrine.

In this Originating Summons the question for decision was whether there was a valid charitable trust created by a Deed of Indenture made by one Lim Boon Haw (deceased). The material parts of the Deed are as follows:—

"(2) The Trustees shall permit all or any of the buildings for the time being standing on the said land (all of which are hereinafter referred to as "the Temple") to be used in perpetuity as and for the purposes of a Temple in manner and with the powers and provisions hereinafter appearing.

(3) The Trustees shall permit the Temple to be used for all or any of the following purposes viz: (a) for ancestral worship and religious rites and sacrificial offerings; (b) for studying and preaching and teaching; (c) for all kinds of meetings connected with the Temple; (d) for any other purposes calculated or tending in the opinion of the Trustees to improve or benefit the moral, social or intellectual condition of the adherents of the Temple.

(4) Only those of the Chinese race and bearing the surname of Lim shall be and are eligible to attend the Temple for the purpose of worship or otherwise in accordance with the principles of the Temple.

(5) The name of the Temple shall be "Yong Ghee Kong Soo".

Held: (1) a trust to found a Temple where all the members of a Chinese "Seh" may carry on ancestral worship may be a charitable trust, but in this case the objects of the trust are not confined to objects of a charitable nature and therefore the trust fails as a charitable trust; (2) in the circumstances of the case it is impracticable to carry out the trusts and the cy-pres doctrine could not be applied.

Cases referred to :—

(1) *Attorney-General v. Thirpooree Soonderee* 1 Ky. 377.

(2) *In re Low Kim Pong's Trust Settlements* (1938) M.L.J. 119.

(3) *The Thames and Mersey Marine Insurance Co. Ltd. v. Hamilton Fraser & Co.* (1887) 12 A.C. 484.

(4) *Choa Choon Neo v. Spottiswoode* 1 Ky. 216.

(5) *Cheang Tew Muey & Ors. v. Cheang Cheow Lean Neo & Ors.* (1930) S.S.L.R. 58.

(6) *Morice v. Bishop of Durham* (1805), 32 E.R. 656.

(7) *In re Wilson* (1913) 1 Ch. 314.

(8) *In re Packe* (1918) 1 Ch. 437.

(9) *Re University of London Medical Sciences Institute Fund* (1909) 2 Ch. 1.

ORIGINATING SUMMONS.

Ong Huck Lim for the applicants.

F. G. Pooley and *Ban It Chiu* for the respondent.

C. Wylie (Federal Counsel) for the Attorney-General.

Bostock Hill J. : — This was an application for the construction of an Indenture dated the 19th July, 1926 whereby the Grantor Lim Boon Haw sold for $1 to Trustees and conveyed to them certain land and hereditaments on certain trusts. The Grantor lived until 1932, and the house No. 1, Light Street, Penang, standing on the said land, was used by him up to his death as a family house. It was so used by his family after his death and in fact the trusts created under the Indenture have never been carried out.

The relevant parts of the Indenture are as follows :—

Whereas the Grantor has contracted with the Trustees for the absolute sale to them of the land and hereditaments intended to be hereby conveyed for the sum of $1. And whereas the Grantor is desirous of dedicating the said land and hereditaments to religion and for that purpose the Grantor is desirous of conveying the same to the Trustees for the use and upon the trusts hereinafter expressed. Now This Indenture Witnesseth as follows:—

(1) In consideration of the sum of Dollar one ($1) paid to the Grantor by the Trustees (the receipt whereof the Grantor hereby acknowledges) the Grantor as beneficial owner hereby conveys unto the Trustees All the land and hereditaments described in the Schedule hereto To Hold the same unto the Trustees in fee simple upon the trusts and with and subject to the powers and provisions hereinafter contained.

(2) The Trustees shall permit all or any of the buildings for the time being standing on the said land (all of which are hereinafter referred to as 'the Temple') to be used in perpetuity as and for the purposes of a Temple in manner and with the powers and provisions hereinafter appearing.

(3) The Trustees shall permit the Temple to be used for all or any of the following purposes viz:—

(a) for ancestral worship and religious rites and sacrificial offerings.

(b) for studying and preaching and teaching.

(c) for all kinds of meetings connected with the Temple.

(d) for any other purposes calculated or tending in the opinion of the Trustees to improve or benefit the moral, social or intellectual condition of the adherents of the Temple.

(4) Only those of the Chinese race and bearing the surname of Lim shall be and are eligible to attend the Temple for the purpose of worship or otherwise in accordance with principles of the Temple.

(5) The name of the Temple shall be 'Yong Ghee Kong Soo'.

(6) Subject to the provision of these presents the Temple shall be under the sole management and control of the Trustees and shall be used and maintained as they shall direct.

(7) The power of appointing a new trustee or new trustees hereof shall be exercisable by the Trustees and upon any such appointment the number of the trustees may be augmented or reduced."

The applicants in this Originating Summons and the respondent are the surviving Trustees under the Indenture within the jurisdiction of this Court. The respondent Lim Chew Chee refused to join in this application and is the only surviving trustee who proved the Will of the Grantor. He has filed an Affidavit of which paragraphs 2, 3, 4 and 5 read as follows :—

"2. 'Yong Ghee' was the name given to my great-grandfather, the grandfather of Lim Boon Haw deceased, after my great-grandfather's death in accordance with Chinese custom. The name is engraved on the ancestral tablet now housed in the 'Choo Teik Lim' at No. 292 Kampong Bahru, Penang. 'Yong Ghee' is now the name by which my great-grandfather is known to us the descendants.

3. I am informed and verily believe that the name 'Yong Ghee Kong Soo' given to the Temple under the Indenture made on the 19th day of July, 1926 (Regd. No. 110 in Vol. 601) and referred to in paragraph 1(5) of the said affidavit of Lim Chooi Chuan literally interpreted means 'Yong Ghee Family House'. The use of such name would in accordance with Chinese custom limit the use of the 'Temple' to the descendants of 'Yong Ghee'.

4. In reply to paragraph 6 of the affidavit of Lim Chooi Chuan I am informed and verily believe that the Receivers of the Estate of Lim Boon Haw deceased only paid the allowance of $300 per month as directed by Clause 3 of the Will of Lim Boon Haw deceased and referred to in paragraph 5 of the affidavit of Lim Chooi Chuan. The assessment and outgoings in respect of the said premises were paid for out of the said sum of $300 per month.

5. In reply to paragraph 10 I say that ancestral worship of my great-grandfather 'Yong Ghee' aforesaid and my grandfather aforesaid was carried out in No. 1, Light Street, Penang both before and after the execution of the Deed of Settlement. After my father the said Lim Boon Haw's death on the 8th day of January, 1933 ceremonies to his spirit as well as to those of my great-grandfather and grandfather were carried out in the said premises until the family was forced by the Japanese to leave the said premises in or about September, 1944. These ceremonies have since been carried out at the said 'Choo. Teik Lim' at No. 292, Kampong Bahru, Penang where the ancestral tablets are now kept."

The said premises were badly bombed during the war and the whole premises are in urgent need of repair.

The only question which at this stage I am asked to determine is as follows :—

Whether upon the true construction of the above-mentioned Indenture dated the 19th day of July, 1926, and in the events that have happened, there is a valid charitable gift.

Mr. Wylie (Federal Counsel) represented the Attorney-General.

I do not think it can be denied that ordinarily a gift of a building on trust to be used as a Temple for religious purposes would be a good charitable trust. It has been held that a trust for the upkeep of a temple is a trust for the advancement of religion and therefore a good charitable trust. See *Attorney-General v. Thirpooree Soonderee*[1] and *In re Low Kim Pong's Trust Settlements*[2].

In the present instance the Trustees shall by clause (1) (3) (a) permit "the Temple" to be used for ancestral worship and religious rites and sacrificial offerings. I think this sub-clause must be read as "ancestral worship and religious rites and sacrificial offerings *connected therewith.*" I find support for this construction in *Maxwell on Interpretation of Statutes* (9th edition) at page 337, where the learned author says :—

But the general word which follows particular and specific words of the same nature as itself takes its meaning from them and is presumed to be restricted to the same genius as those words

and cites *The Thames & Mersey Marine Insurance Co. Ltd. v. Hamilton Fraser & Co.*[3]. Also it is clear from *Choa Choon Neoh v. Spottiswoode*[4] that both religious rites and sacrificial offerings are involved in Chinese ancestral worship.

It has also been held that trusts to carry out Sin-Chew ceremonies are not charitable because they do not benefit any section of the public. But I am of opinion that a trust to found a Temple where all the members of a Chinese "Seh" (that is, all having one surname) may carry out ancestral worship may be a charitable trust, because all the members of the "Seh" (i.e. a section of the public) benefit by the trust. This seems to be in accord with the decision in *Cheang Tew Muey & Ors. v. Cheang Cheow Lean Neo & Ors.*[5], where it was held that a trust to hold property for use as a burial ground for a man and his family was not charitable, but that a trust to hold property for the purpose of a burial ground for persons belonging to a Chinese "Seh" was a charitable trust. Mr. Ban It Chiu for the respondent argued that a trust for ancestral worship cannot be charitable but, while I agree that if a man establishes a trust for ancestral worship for the benefit of his own soul it is not a charitable trust, yet, if he provides a temple for the benefit of the public or a section of the public (e.g. the members of a Chinese "Seh") then it sems to me that the element of charity is inserted into the trust even though each member of the "Seh" carries out in the Temple ancestral worship for his own benefit. I accordingly find against Mr. Ban It Chiu's contention. But this does not conclude the matter.

Mr. Pooley for the respondent argued with considerable force that some at least of the purposes set out in clause (1) (3) (b), (c) and (d) are not charitable or are not necessarily charitable. I think, for instance, that under Clause (1) (3) (d) the purpose of improving the social condition of the adherents of

the Temple can hardly be considered charitable without straining the word "social", and in the same way I feel doubtful about some of the other "purposes".

Although the principle to be deduced from decided cases is not as clear as it might be, it seems to be settled law that in order to be charitable a trust must not only be declared in favour of objects of a charitable nature but it must also be expressed that in its application it is confined to such objects. See *Tudor on Charities,* 5th Edn., p. 64 and *Morice v. Bishop of Durham*[6].

In the present case the objects of the trust are not, I think, so confined, and I am of opinion that the trust fails as a charitable trust on this ground.

There is also another line of reasoning which seems to me to cause this case to be one in which the Court will not direct that a scheme cy-pres be drawn up. The whole trust is very vague and seems to be mixed up with the idea of the premises being used as a family house. (See Paragraphs 3 and 4 of the Affidavit of Lim Chooi Chuan and also the Affidavit of Lim Chew Chee).

Clause 2 of the Indenture states that the Trustees should permit all or any of the buildings for the time being standing on the land (all of which are hereinafter referred to as "the Temple") to be used in perpetuity as and for the purposes of a Temple.....

If the Trustees are unable or unwilling to decide how much or how many of the buildings on the said land are to be used as a Temple, will the Court step in and decide?

No sum was in the said Indenture set aside for the upkeep of the said Temple, and from Paragraph 12 of Lim Chooi Chuan's Affidavit it is clear that the premises have been damaged by bombing and that there are no funds available for repairs or payment of assessment.

In Paragraph 13 of the said Affidavit it appears that the beneficiaries under the Indenture regard themselves as unable to take any action.

It is further to be noted that by Sub-Clause 5 of Clause 1 of the Indenture the name of the Temple shall be "Yong Ghee Kong Soo" which, it was agreed by Counsel, meant Yong Ghee Family House, and Sub-Clause 6 states that the Temple shall be under the sole management and control of the Trustees and shall be used and maintained as they shall direct. Nothing is said as to how or out of what fund the Trustees are to maintain the said Temple.

Mr. Huck Lim for the Trustees suggested that the whole of the damaged building should be pulled down and new (and smaller) houses should be erected thereon and that one building should be used as "the Temple" and the income derived from the others should be devoted to its maintenance.

I can find no reported case where anything of this sort has been ordered by the Court to be done under a cy-près scheme, and I am of opinion that the only course for me to take is to hold that the Trust has failed, as it is impracticable to carry it out.

Two cases in which a similar view was taken are *In re Wilson*[7] and *In re Packe*[8]. In the former it was held that no paramount general charitable intention could be inferred but that the gift was for a particular purpose, and that, as it was impossible to carry out that purpose, the gift failed altogether.

In re Packe[8] is not unlike the present case. The facts in that case were shortly as follows :—

> A testatrix gave to the Poor Clergy Relief Corporation her freehold cottage and the sum of £1,100 to invest and use the income thereof for its upkeep. The Corporation renounced the device and the executors were unable to find any other society willing to undertake the trust, the reasons being the distance of the cottage from the Railway Station and the insufficiency of the fund to carry on the premises as directed by the testatrix. It was *held* that, as the particular charitable purpose for which the bequest was made was impracticable, and no paramount general charitable intention was implied by the will, the charitable bequest failed and the property fell into residue.

In *Tyssen's Charitable Bequests,* 2nd Edn., p. 195 the principle as to what is a general charitable intention is set out as follows :—

> Where there is merely a gift in favour of the foundation or support or benefit of a definite institution, establishment, or society, there is to be deemed no general intention in favour of charity from the fact that the purposes of such institution, establishment or society are charitable.

That principle conforms with the judgment of Parker J. in *In re Wilson,* cited above, and I am of opinion that the Indenture in the case before me comes within that principle.

Tudor on Charities, 5th Edn., p. 141 points out that the cy-près principle is confined to property given with a general intention of charity and cites *Re University of London Medical Sciences Institute Fund*[9].

I find therefore that in the circumstances of the present case it is impracticable to carry out the trust and that the cy-près doctrine is not applicable.

Accordingly the answer to the Question I am asked to decide (Question 1) is that the gift fails as a charitable gift.

Order accordingly.